IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 09-0682

JEANNETTE DIAZ, LEAH HOFFMANN-BERNHARDT, RACHEL LAUDON, individually and on behalf of others similarly situated

Plaintiffs and Appellants,

v.

BLUE CROSS & BLUE SHIELD OF MONTANA, NEW WEST HEALTH SERVICES, MONTANA COMPREHENSIVE HEALTH ASSOCIATION, STATE OF MONTANA, and JOHN DOES 1-100,

Defendants and Appellees.

APPELLEE NEW WEST HEALTH SERVICES' ANSWER BRIEF

On Appeal from the District Court of the First Judicial District
of the State of Montana in and for the County of Lewis and Clark
Cause No. BDV-2008-956
The Honorable Jeffrey Sherlock

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STATEMENT OF THE ISSUES PRESENTED

Did the District Court err in denying Appellants' Motion to Certify the Class based upon Appellants' failure to meet the specificity, commonality and typicality requirements of Rule 23(a), Mont. R. Civ. P., and the predominance and superiority requirements of Rule 23(b)(3)?

STATEMENT OF THE CASE

This case is fundamentally an action for money damages brought by three individuals who are attempting to join many parties in a single class who have very different claims against multiple types of defendants. Specifically, the putative class has been defined broadly by Appellants as those who have a claim against various entities "involved in operating or administering their health insurance plans" for Appellees' alleged refusal or failure to pay covered medical expenses in violation of Montana's "made whole" laws. *See* Appendix 1, Plaintiffs' Memorandum in Support of Class Certification, p. 2. Appellants assert they are individuals who were injured in auto accidents where damages for their injuries were legally the responsibility of a third party insurer other than the Appellees. Despite the medical claims for those injuries being paid for by the third party insurer, Appellants argue Appellees *per se* violated Montana's "made whole" doctrine by denying duplicate claims which were already paid to the provider by

the third party insurer or by accepting reimbursement from these providers who refused to tender double-payment of the claims.

Appellants and the putative class argue they were automatically not made whole by the payment of their medical claims and other payments for their injuries because they were not paid twice for those medical claims, once by the third party insurer and second time under their employee benefits plan. As stated by the District Court in its Order denying Appellants' Motion to Certify the Class:

> Plaintiffs seek a declaratory ruling that Defendants' failure to double-pay medical benefits, and their actions in accepting reimbursement for benefits which were paid by the tortfeasor's liability insurer, violate the made whole insurance law of Montana explained in *Skauge v. Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 565 P.2d 628 (1977), and its progeny.

Appendix 2, Order Re: Class Action Request ("Order"), p. 6.

Appellants' proposed Amended Complaint asserts claims for breach of contract, deceit, fraud and violation of the Unfair Trade Practices Act, Mont. Code Ann. § 33-18-201, *et seq*. Appendix 3, Amended Complaint, pp. 5-16. Appellants also sought leave to amend their Complaint to add counts sounding in fraud and deceit and have asserted they are therefore entitled to punitive damages. *See* Appendix 4, Plaintiffs' Memorandum in Support of Motion to Amend Complaint and attached Amended Complaint. Appellants' Motion to Certify the Class and Motion to Amend Complaint were fully briefed before the District Court and a two-day hearing was held on August 24-25, 2009 regarding Plaintiffs' certification

motion. The District Court, Judge Jeffrey Sherlock presiding, issued an Order Re: Class Action Request on December 16, 2009, denying Appellants' Motion to Certify the Class and withholding a ruling on Appellants' Motion to Amend Complaint. Appellants have brought this appeal based on that Order.

STATEMENT OF FACTS

Plaintiffs' Complaint is premised on the denial of medical and dental benefits due to payments for such claims being otherwise covered by automobile insurance. New West acts as a third-party administrator ("TPA") for employee benefit plans offered by the State of Montana to its employees. New West does not act as an insurer for such plans. Instead, New West acts solely as the administrator to process claims pursuant to the employee benefit plans created and offered to employees by the State of Montana. *See* Appendix 5, Class Certification Hearing (August 24, 2009) ("Tr."), 236-41.

For purposes of Appellants' Motion to Certify the Class and this appeal, the pertinent facts for New West relate only to Appellant Leah Hoffmann-Bernhardt's claims because she is the only Appellant with any possible claim against New West. *See* Appendix 6, Jeannette Diaz's Answers to New West's First Discovery Requests, Request for Admission No. 1. Ms. Bernhardt alleges she was injured in a motor vehicle accident which occurred on September 15, 2005. Complaint, Count Two, ¶ 1. The tortfeasor's insurer, State Farm, paid "medical costs of

several thousand dollars" to Ms. Bernhardt's medical providers based on a request that it pay those expenses. *Id.* Although State Farm was paying her medical expenses related to her accident directly to her medical providers, as she specifically requested, Ms. Bernhardt was also making claims for payment of the same medical expenses from the State of Montana's employee benefit plan administered by New West. *Id*., ¶ 2. Ms. Bernhardt alleges New West refused to pay benefits because medical providers had refunded money previously paid by New West since State Farm was making the requisite payments resulting from the negligence of its insured. *Id*. Ms. Bernhardt contends such reimbursement or refusal to pay for medical expenses which were paid by State Farm violates Montana's "made whole" laws. *Id*., ¶ 3.

Ms. Bernhardt settled her claim with State Farm on or about September 26, 2008. Despite policy limits of $100,000, Ms. Bernhardt settled her claim against State Farm's insured for $67,927.18. *See* Order, p. 4. Prior to the filing of this lawsuit, New West was not notified Ms. Bernhardt or her attorney, Jim Hunt, that Ms. Bernhardt questioned New West's acceptance, on behalf of the State of Montana, of reimbursements from providers for medical services paid by State Farm.

At all times pertinent to this action, New West administered claims pursuant to the State of Montana's Employee Benefits Summary Plan Document and

Managed Care Plan Supplement to the Summary Plan Document. *See* Appendix 7 and 8, New West Health Services' Brief in Opposition to Plaintiffs' Motion to Amend Complaint, Exhibits B and C. The Employee Benefits Summary Plan provides for subrogation under Coordination of Benefits Section 5.5 and requires the State Plan member to provide notice of the intent to pursue recovery from a third party. The Summary Plan excludes from coverage expenses covered or paid by other pertinent insurance policies. The Supplement also excludes from coverage services and supplies which another entity, like State Farm, is legally obligated to pay. Ms. Bernhardt was fully aware based on the Explanation of Benefits provided to her by New West the medical bills submitted to New West were paid and then reimbursed to the State of Montana, through New West as the TPA. *See id.*, IP 1-10.

Pursuant to the Plan documents, New West administered the claims relating to Ms. Bernhardt's auto accident. New West has no contractual relationship with the individual members of the State of Montana's employee health plan, only with the State of Montana itself. Tr. 237. As a TPA, New West simply processes claims on behalf of the State of Montana. Tr. 236. When New West received claims relating to Ms. Bernhardt in 2005 and 2006, it processed and paid all claims, never once denying claims submitted by Ms. Bernhardt's providers based on other insurance coverage. Tr. 240-41, 249. In fact, New West had no means of

knowing or determining a third-party was paying for these same claims until the State of Montana, through New West as the TPA, received reimbursement from providers after the claims were already paid by a third-party. Tr. 240. Such reimbursements have no impact on New West's payment of subsequent claims for the same individual. Tr. 240-41. New West never solicited any refunds or reimbursements or asserted a subrogation right for claims paid on behalf of the State of Montana relating to Ms. Bernhardt. Tr. 241-42.

STANDARD OF REVIEW

Plaintiffs correctly note the standard of review for an order regarding class certification is abuse of discretion. *Sieglock v. Burlington Northern Santa Fe Ry. Co.*, 2003 MT 355, ¶ 8, 319 Mont. 8, 81 P.3d 495. This Court has previously held:

> Trial courts have the broadest discretion when deciding whether to certify a class. *McDonald v. Washington* (1993), 261 Mont. 392, 399, 862 P.2d 1150, 1154. The judgment of the trial court should be accorded the greatest respect because it is in the best position to consider the most fair and efficient procedure for conducting any given litigation. *McDonald*, 261 Mont. at 399-400, 862 P.2d at 1154.

Id.

SUMMARY OF ARGUMENT

The sole issue on appeal in this case is whether the District Court abused its discretion in finding the Plaintiffs failed to satisfy their burden of proof in establishing the elements of Rule 23(a) and (b), Mont. R. Civ. P., are satisfied. A review of the record clearly shows the District Court did not abuse its discretion in

this case, and therefore its Order denying certification of the class should be affirmed.

Pursuant to Rule 23, Mont. R. Civ. P., to certify a class, the moving party must prove all requirements of Rule 23(a) and (b) are met. The District Court here properly found Appellants failed to establish the requisite "specificity, commonality, and typicality requirements of Rule 23(a) for class certification, and fail[ed] to meet the predominance and superiority requirements of Rule 23(b)(3)." Order, p. 16. In addition to the Court's reasoning, class certification fails due to the distinctly and legally different roles of each of the Appellees. Class certification is also improper due to Appellants' class definition which is not only excessively amorphous but requires proof of the ultimate issues in this case to establish membership in the class. Appellants have failed to reconcile these deficiencies in the class definition or their ability to satisfy all of the requirements of Rule 23.

ARGUMENT

The District Court properly denied class certification in this case based on the Plaintiffs failure to meet the requirements of Rule 23(a) and (b), Mont. R. Civ. P. "When certifying a class, the party seeking certification has the burden of proving that the proposed class meets all the requirements of Rule 23." *Sieglock v. Burlington Northern Santa Fe Ry. Co.*, 2003 MT 355, ¶ 10, 319 Mont. 8, 81 P.3d

495 (citing *Polich v. Burlington Northern, Inc.*, 116 F.R.D. 258, 260 (D. Mont. 1987)). Rule 23, Mont. R. Civ. P., provides, in pertinent part:

> (a) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> > (1) the class is so numerous that joinder of all members is impracticable,
> >
> > (2) there are questions of law or fact common to the class,
> >
> > (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
> >
> > (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> >
> > (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> >
> > (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other

> available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class.

Montana's Rule 23 is nearly identical to its federal counterpart, Fed. R. Civ. P. 23. This Court has concluded cases interpreting the federal rule are persuasive and instructive authority in interpreting the Montana class action rule. *McDonald v. Washington*, 261 Mont. 392, 400, 862 P.2d 1150, 1154 (1993).

The class action device was designed as an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *General Telephone Co. v. Falcon,* 457 U.S. 147, 155 (1982). The District Court is vested with the discretion to deny class certification if all the requirements are not satisfied. *Murer v. State Compensation Mutual Insur. Fund*, 257 Mont. 434, 436, 849 P.2d 1036, 1037 (1993). It is the plaintiffs' burden to prove all the Rule 23 elements to certify a class and maintain a class action lawsuit. *McDonald*, 261 Mont. at 400. Failure of the Plaintiff to prove any one of the requirements for class certification is fatal to class certification. *Murer*, 257 Mont. at 436. According to the United States Supreme Court, district courts are required to "rigorously assess" whether each of the requirements of Rule 23 have been met. *Falcon*, 457 U.S. at 161.

I. Appellants and putative class members have no claims against New West as a third-party administrator.

Appellants in this case have brought a lawsuit not only against the State of Montana, but the independent TPAs. However, New West has no contractual relationship with the individual members of the State of Montana's employee health plan. In its capacity as a TPA, New West simply processes claims on behalf of the State of Montana. For example, when New West received claims relating to Ms. Bernhardt in 2005 and 2006, it processed and paid all claims, never once denying claims submitted by Ms. Bernhardt's providers. In fact, New West had no means of knowing or determining a third-party was paying for these same claims until the State of Montana, through New West as the TPA, received reimbursement from providers after the claims were already paid by a third-party. Such reimbursements have no impact on New West's payment of subsequent claims for the same individual. New West never solicited any refunds or reimbursements or asserted a subrogation right for claims paid on behalf of the State of Montana relating to Ms. Bernhardt.

Appellants argument in their Opening Brief about this Court's decision in *Blue Cross & Blue Shield of Mont., Inc. v. Montana State Auditor*, 2009 MT 318, 352 Mont. 423, 218 P.3d 475, is misplaced. In contrast to New West's role as a TPA for the State of Montana, the *Blue Cross* decision concerned a fully-insured plan issued by Blue Cross ("BCBS"). This Court has never extended "made

whole" or subrogation principles to administrators of health care plans which have been reimbursed by medical providers for medical expenses paid by a tortfeasor's insurer. Following this reasoning, New West could not accept reimbursement from medical providers who had been paid from two sources for the same medical care until her claim against State Farm was fully resolved by settlement, in this case approximately three years after Ms. Bernhardt's accident. Because of a *Ridley* claim for medical benefits, State Farm was obligated to make payments or face a bad faith claim if it did not pay promptly. *See* Tr. 287-88.

There is simply no evidence Ms. Bernhardt or any putative class member has any claim against New West for its role as a TPA, essentially a processing agent for the State of Montana. Appellants' Complaint alleges claims of breach of contract and unjust enrichment. However, New West has no contractual arrangement with any party in this case except the State of Montana and it was not "enriched" because any reimbursements were passed through to the State. New West never denied payments for claims and simply followed the plan created by the State of Montana. Therefore, the District Court properly denied class certification as to New West.

II. The District Court properly considered the applicable facts and laws of Appellants' case to evaluate the requirements of Rule 23.

In *Mattson v. Mont. Power Co.*, as recited by the District Court in its Order, this Court clearly stated the district court may certify a class only after determining

all of the Rule 23 requirements are met; such determination can be made only upon resolution of factual disputes; and the obligation to make these determinations "is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement." 2009 MT 286, ¶ 67, 352 Mont. 212, 215 P.3d 675 (quoting *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 41 (2d Cir. 2006). Thus, while the merits of the case unrelated to the requirements of Rule 23 are not to be considered for purposes of class certification, the merits of the case are wholly relevant and necessary to consider as they relate to such requirements.

Consistent with *Mattson*, the District Court here necessarily considered certain legal and factual issues to determine whether the class could be certified. Appellants' proposed class definition necessitated the District Court's consideration of the individual facts of the named Appellants' claims, including (1) whether the proposed class definition would result in countless mini-trials; (2) the number of similarly situated individuals with commonality and predominant legal or factual issues; and (3) the different roles of a self-insured state employee benefits plan, on the one hand, and two different TPAs of that plan, on the other. In evaluating the specific facts and law underlying Appellants' claims to determine if the requirements of Rule 23 could be met, the District Court did not abuse its discretion.

III. The District Court properly ruled Appellants failed to adequately define the class.

The threshold inquiry in determining class certification must be into the parameters of the proposed class. *See Ad Hoc Comm. v. City of St. Louis*, 143 F.R.D. 216, 219 (E.D. Mo. 1992); *Polich v. Burlington Northern, Inc.*, 116 F.R.D. 258, 261 (D. Mont. 1987). Rule 23 implicitly requires the representative plaintiffs to demonstrate not only an identifiable class exists, but it is susceptible to precise definition. *Polich*, 116 F.R.D. at 261; *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). Absent a cognizable class, evaluating whether the putative class representatives satisfy the Rule 23(a) and (b) requirements would be impossible. *See Metcalf v. Edelman*, 64 F.R.D. 407, 409 (N.D. Ill. 1974).

A properly defined class is imperative for a suit to proceed as a class action because the class definition facilitates identifying, at the outset, the individuals affected by the litigation, and protects their interests. The class definition determines: (1) who is entitled to notice; (2) the nature of the relief which can be awarded and who is entitled to that relief; and (3) identifies plaintiffs who will be bound by the judgment if they lose, and ensures those actually harmed will receive the relief awarded. *See* Mont. R. Civ. P. 23(c); *see also Falcon*, 457 U.S. at 160-161.

For a class to be sufficiently defined, it must be precise: the class members must be presently ascertainable by reference to objective criteria. *See*

DeBremaecker, 433 F.2d at 734; *Schwartz v. Upper Deck*, 183 F.R.D. 672, 680 (S.D. Cal. 1999).

The class definition must not require a determination of the merits. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). A proposed class definition resting on the ultimate liability issue cannot be objective, nor can the class members be presently ascertained. *See DeBremaecker*, 433 F.2d at 734; *Schwartz*, 183 F.R.D. at 680. When the class definition is framed in this manner, the trial court has no way of knowing who is in the class until the ultimate liability question is decided. *See Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980). When a proposed class is "so amorphous and diverse, it cannot be reasonably clear that the proposed class members have all suffered a constitutional or statutory violation warranting some relief." *Id*.; *see also Berman v. Narragansett Racing Assn.*, 414 F.2d 311, 317 (1st Cir. 1969).

While the class definition has been a moving target throughout the District Court proceedings and no definition is actually provided in Appellants' Opening Brief, Appellants' Complaint appears to place some parameters on an otherwise indeterminate group of individuals. The Complaint states Plaintiffs will "have the following characteristics in common with the class":

> (1) They are all insured under health insurance plans and policies administered or operated by the defendants.

(2) They have been injured through the legal fault of persons, who have legal obligations to compensate them for all damages sustained.

(3) They have not been made whole for their damages.

(4) In violation of Montana law, the defendants have programmatically failed to pay benefits for their medical costs even though they have not been made whole.

Complaint, p. 10. Appellants' failed attempt to define the scope of the putative class is apparent.

The District Court defined the class as including:

[C]urrent and former State employees covered by the State employee benefit plan, or MCHA insureds, who:

1. were injured in automobile accidents caused by third parties whose auto liability insurer paid medical bills in accordance with *Ridley*.[1]

2. are subject to the above-referenced exclusions from coverage;

3. were arguably not made whole by the tortfeasor, the tortfeasor's insurer, or their own automobile insurer; and

4. claim entitlement to the amount of medical benefits which would have been paid under the State of [sic] MCHA's schedule of benefits but for payment by the tortfeasor's auto liability insurer, or some other insurer.

Order, pp. 5-6. The "exclusions from coverage" refers to exclusions in the applicable health benefit plans which "preclude[] double payment of medical

[1] This Court in *Ridley* held a requires a tortfeasor's insurer to pay medical expenses of an injured third party if liability is reasonably clear. *Ridley v. Guaranty Nat. Ins. Co.*, 286 Mont. 325, 334, 951 P.2d 987, 992 (1997).

expenses if an insured's medical bills have been paid by an auto or premises liability insurer." *Id*., p. 5.

Appellants' argument regarding alleged similarities to the class definition in the case of *Ferguson v. Safeco, Inc.*, 2008 MT 109, 342 Mont. 380, 180 P.3d 1164, fails to withstand scrutiny. *See infra*, Section IV. As the District Court concluded:

> While Plaintiffs have conceptually based their allegations on the made-whole doctrine, they have clearly failed in defining their class; where the *Ferguson* plaintiffs succeeded. Unlike the objective characteristics in *Ferguson* which involved one automobile insurer, the proposed class in this case involves employees of a State employee plan not governed by Title 33 of the Insurance Code, and an insurer of last resort, and automobile insurers who are legally required to pay the claims at issue. In addition, the class cannot be ascertained at all without a declaratory ruling as to the application of the other insurance exclusions at issue with reference to the facts of the claims presented, including individualized and subjective analysis as to whether each class member was made whole, and, if not, the amount of benefit entitlement and other damages which may be available.
>
> .....
>
> The success or failure of each class member's claim depends on facts peculiar to his or her situation. Similarly, under the proposed amended complaint, each putative class member would be required to prove the elements of fraud, deceit, bad faith, and damages. *Id*.

Order, pp. 16-17. The District Court's findings not only lack an abuse of discretion but are succinctly accurate in describing the flaws in Appellants' amorphous class definition.

Appellants' class is fatally flawed by the fact it requires proof of certain legal and factual issues not readily determinable and thus would require mini-trials

simply to identify potential class members. Specifically, the putative class consists of injured persons who are entitled to compensation from other persons "who have legal obligations to compensate them for all damages sustained." However, this characteristic leaves open the inherent ambiguity of what damages the class members are entitled to and whether other determinations are considered, including but not limited to collateral sources, comparative negligence and punitive damages awards. Appellants make no distinction between those putative class members who were actually made whole, through direct payment of medical claims, as required by this Court's decision in *Ridley*, and/or through other insurance proceeds.

The definition also fails to identify what legal obligation is owed to the class members. For example, if a putative class member is involved in an auto accident caused, in part, by another driver and in part by the class member, there is no certainty as to what legal obligations are owed to the class member and whether the class member would, in fact, be entitled to "all damages sustained." There is no distinction as to whether the "legal obligation" is subjective or one objectively provided for.

The class definition, whether it be Appellants' definition in the Complaint or the District Court's definition with which Appellants' take issue, premises inclusion in the class on the ultimate liability issue in the case – whether the

various Appellees could be held liable for denying claims when it has not been decided whether each individual class member was made whole. *See DeBremaecker*, 433 F.2d at 734. Appellants improperly assume factual inquiries and presuppose the ultimate liability questions – that individual class members were not made whole and the Defendants were legally obligated to pay for medical costs and not accept reimbursements – making identification of putative class members an impossibility. As the District Court appropriately stated, "the issue of whether an injured claimant has been made whole is a question of fact dependent on the level of his/her physical recovery and the extent of her compensation through benefits paid and/or damages recouped." Order, p. 7 (citing *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 929 P.2d 205, 211 (1996)).

Ironically, Appellants' Opening Brief highlights yet another failure of the class definition to withstand scrutiny. Appellants argue they "allege the Respondents have programmatically employed a variety of devices before and after their insureds have resolved their claims with the tortfeasors to defeat the insureds' 'made whole' rights." Appellants' Opening Brief, p. 33. Appellants go on to state "[t]he various devices will be fully developed in discovery once certification takes place." *Id*., p. 34. Appellants' own argument is indicative of the larger picture of this case. Appellants simply want to certify a class, then fill in the details later. Obviously once the class is certified, the burden shifts to the

Appellees to decertify the class at a later date. Appellants have sought to replicate the arguments contained in the *Ferguson* decision (i.e. "programmatically" employing a variety of devices) with both facts and a class definition which are far beyond the scope of *Ferguson*, as discussed below. As Appellants admit, they have not even "fully developed" which devices have been allegedly "programmatically" employed by the Appellees. Such a deficiency alone makes class certification impossible.

Finally, Appellants make the cursory argument the District Court erroneously redefined the class, thereby narrowing it. Appellants' argument is clearly a distinction without a difference. When compared, as above, the two definitions are effectively the same. If anything, the District Court's rephrasing of the class definition simply allowed the Court to apply the requirements of Rule 23 to the amorphous description of the class contained in Appellants' Complaint.

IV. *Ferguson* is readily distinguishable from Appellants' proposed class.

Before both the District Court and this Court, Appellants have sought to fit the square peg of their class certification into the round hole of the *Ferguson* decision. Appellants appear to argue that modeling a Complaint upon that of another case will automatically enable the District Court to certify the class, even if the factual and legal issues are significantly different. As the District Court properly held, *Ferguson* fails to support class certification in the case *sub judice*.

In addition to having a definable class, the *Ferguson* case did not involve "'made-whole' money-damage entitlement," as the District Court here concluded:

> The legal question presented for declaratory ruling was whether Safeco could pay an insured amounts owed under its automobile policy and then seek reimbursement from the third-party tortfeasor's insurer for property damage paid – without reimbursing the insured for his/her deductible or other out-of-pocket expenses. Because class members were not required to prove they were not made whole (because all insureds would be owed their property damage deductibles), the Montana Supreme Court determined that the district court erred in refusing to grant class certifications [sic].

See Order, p. 14. (citations omitted).

Ferguson involved a very succinct properly identified class of individuals. In her Motion for Class Certification, the plaintiff in that case defined the class as individuals (1) insured by Safeco; (2) who suffered expenses covered under such policy; (3) who received payments under the coverages of that policy; (4) where Safeco recovered from a third party subrogation for some or all of such payments; and (5) whose claim arose within eight years of the filing of plaintiff's complaint. 2008 MT 109, ¶ 7. Based on the class definition, the District Court could readily ascertain the identity of class members without making any final adjudication of the merits of the case, stating: "[Plaintiff's] class claims do not seek a determination of entitlements for each class member and the payment of damages; rather, her class claims seek a declaratory ruling." *Id*. at ¶ 34. Based on the

request for declaratory relief and the narrow scope of the issues, the Supreme Court reversed the District Court's denial of class certification.

While Plaintiffs in this case may have conceptually based their allegations on the "made whole" doctrine, they have clearly failed in defining their class where the *Ferguson* plaintiff succeeded. Unlike the objective characteristics set out in *Ferguson*, the proposed class in this case cannot be ascertained at all without individualized and subjective analysis of whether the class members were made whole and, if not, whether the defendants improperly denied medical claims.

Appellants also fail to recognize the simple but critical fact that this case does not involve subrogation. Ms. Bernhardt is the only Appellant who could possibly assert a claim against New West and her claim is based on no affirmative conduct whatsoever on the part of New West. New West received and paid the claims submitted by Ms. Bernhardt's providers. When providers had already been paid by State Farm, the providers returned the funds to New West who, in turn, returned the funds to the State of Montana. Nowhere in this case are there issues of "pay and pursue" subrogation which were at issue in *Ferguson*. Instead of a united set of facts and law, as presented in *Ferguson*, this case involves facts and legal obligations unique to each individual Plaintiff and putative class member based on numerous factors, including (1) whether the Plaintiff or putative class member was in fact made whole prior to a particular defendant's denial of the

claim; (2) whether the facts relating to each individual Plaintiff and putative class member support claims for fraud, deceit, breach of contract and violation of the Unfair Trade Practices Act; and (3) whether the individual Plaintiff or putative class member was in fact damaged and, if so, in what amount.

Appellants' claims are also significantly different from those in *Ferguson* based on the inclusion of multiple Appellees with varying legal responsibilities. Appellants have alleged claims against not only providers of employee benefit plans, but also TPAs. These entities are subject to different legal obligations and have different responsibilities, if any, to Appellants. Each individual Appellant and putative class member will inevitably have had different experiences with a given provider of employee benefit plans or TPA and have not had experience with all of the various Appellees. Appellants and putative class members do not have a sufficient common nexus either in terms of facts or law as was presented in *Ferguson*, resulting in inevitable mini-trials for each putative class member.

Therefore, rather than supporting Appellants' attempts to certify a class, *Ferguson* merely highlights the fatal deficiencies in Plaintiffs' proposed class definition.

V. Appellants have failed to satisfy all of the requirements of Rule 23(a).

The Plaintiff has the burden to prove all the Rule 23 elements to certify a class and maintain a class action lawsuit. *McDonald v. Washington*, 261 Mont.

392, 400, 862 P.2d 1150, 1154 (1993). Failure of the plaintiff to prove any one of the requirements for class certification destroys the alleged class action. *Murer v. State Compensation Mutual Insur. Fund*, 257 Mont. 434, 436, 849 P.2d 1036, 1037 (1993). In addition to failing to provide a class which can be defined by objective characteristics, as discussed above, Appellants failed to satisfy the requirements of Rule 23(a).

A. Appellants failed to prove numerosity.

Rule 23 requires the class be so numerous that joinder of all members is impracticable. *See* Mont. R. Civ. P. 23(a)(1). The class representatives must not speculate, but rather must present evidence of the number of members in the class. *Polich*, *supra*, 116 F.R.D. at 261. Appellants simply state the District Court did not challenge this requirement. Appellants' Opening Brief, p. 20-21. The only evidence proffered on numerosity was the testimony of Appellants' own counsel, James Hunt, who testified that he could not tell how many people would be similarly situated to Ms. Bernhardt and "it's impossible to tell." Tr., p. 274. The District Court may not have challenged the numerosity simply because Appellants failed to present any credible evidence the requirement could be met. As Appellants failed to meet their burden of proving numerosity, class certification was appropriately denied.

B. Appellants cannot satisfy the commonality requirement.

There must be questions of law or fact common to the class. Rule 23(a), Mont. R. Civ. P. In this case, each Appellant and putative class member brings a unique set of allegations and facts to his or her case. Appellants make no substantive argument on commonality, instead summarily concluding that because they have modeled their Complaint on that of *Ferguson*, there is commonality. *See* Appellants' Opening Brief, pp. 21-22. As *Ferguson* is inapplicable, the District Court did not abuse its discretion in finding Appellants failed to meet their burden on the requirement of commonality.

The alleged common issues of fact and law allege by Appellants are not salient facts and are not substantially related to resolving this litigation. Rather, Appellants' claims are based on unproven assumptions that, if established, may ultimately provide a basis for recovery – namely, Appellees and putative class members were not made whole and Appellees, in their various roles and actions, committed fraud, deceit, breach of contract, and individualized statutory violations of the Unfair Trade Practices Act.

The *Polich* decision is especially instructive on the commonality element as it relates to the case at hand. 116 F.R.D. 258. In that case, plaintiffs sought to certify a class of plaintiffs alleging, *inter alia*, fraud. *Id.* The *Polich* court held,

> Defendants' arguments regarding the individual nature of proof of fraud cases is well taken. Taking just one element, the affected

> employee's consequent and proximate damage, for example, the court finds that a wide variance of proof necessarily would be present in the instant action. Separate adjudications would be required as to whether the [defendant's] conduct caused damage to each affected employee and as to the extent of such damage. In summary, a decision in the case of one affected employee would have no effect on a decision in another case.

Id. at 262.

Courts have routinely and uniformly held granting class certification is improper where claims of fraud, bad faith, or other claims which require individualized proof exist. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1412-1413 (D.C. Cir. 1984); *Newell v. State Farm Gen. Insur. Co.,* 118 Cal. App. 4th 1094, 1102-1103 (Cal. App. 2004) (denying class certification on bad faith claims because individualized proof required); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001) ("claims for money damages in which individual reliance is an element are poor candidates for class treatment, at best."); *Baroni v. Bellsouth Telecommunications, Inc.*, 2004 WL 1687434, *7-8 (E.D. La. July 27, 2004) (claims for fraud and fraudulent misrepresentation require proof of individualized reliance and cannot be properly certified as a class).

In *Newell*, the California appellate court denied a motion for class certification where plaintiffs alleged bad faith, breach of contract and improper claims handling practices involving an alleged common scheme following earthquakes in California. 118 Cal. App. 4th at 1103. The court denied

certification, finding that even if common facts existed and the insurer defendants had adopted a common practice of denying claims, "each putative class member still could recover for breach of contract and bad faith *only* by proving his or her individual claim was wrongfully denied, in whole or in part, and the insurer's action in doing do was unreasonable." *Id.* The court held that such a showing necessarily requires individualized proof, and "in such cases, class treatment is unwarranted." *Id.*

On the most basic level, the complete lack of commonality can be best understood by considering the factual basis for the claims of the two named Appellants who are members of the State of Montana's employee benefits plan – Ms. Bernhardt and Ms. Diaz. Ms. Bernhardt's employee benefit plan was administered by New West. No plan exclusion was ever invoked concerning claims for payment submitted by providers who treated Ms. Bernhardt. In fact, every claim which was submitted was paid by the State of Montana through New West as its TPA. Ms. Bernhardt settled her claim with State Farm for approximately two-thirds of the policy's limit.

In contrast, Ms. Diaz's employee benefit plan was administered by BCBS. The record indicates a plan exclusion was invoked which precluded double-payment of medical claims which were already paid by State Farm. Ms. Diaz settled with State Farm for policy limits. *See* Order, pp. 3-4.

Clearly, there are no facts or legal issues common to these two named Appellants, let alone the putative class members who cannot even be identified based on the flawed class definition. Even the alleged wrongful conduct which could give rise to a claim against either New West or BCBS is entirely different – New West never invoked a plan exclusion and merely accepted, on behalf of the State of Montana, reimbursements from medical providers for bills which were already paid. The only common factual or legal issue between these two named Appellants is they have failed to establish any legitimate means of holding New West or BCBS, as TPAs, legally liable for any alleged damages. This "common" characteristic is not one which could satisfy the requirement of Rule 23(a).

Appellants have alleged causes of action based on theories of fraud, deceit, violations of the Unfair Trade Practices Act, bad faith, and breach of contract. For example, to prove a fraud claim, each Appellant and putative class member would have to prove the nine (9) highly-individualized and fact-specific elements. *See Poulsen v. Treasure State Indus.,* 192 Mont. 69, 626 P.2d 822, 825 (1981) ("Actual fraud is always a question of fact."). The District Court would thus be required to analyze the specific and individualized facts – essentially mini-trials – related to each Appellant and putative class member's claim.

Based on the relevant facts and case law, the District Court properly concluded Appellants failed to meet the commonality requirement, stating:

> Because individualized assessment will be required, Plaintiffs fail to meet the specificity, commonality and typicality requirements of Rule 23(a) for class certification, and fail to meet the predominance and superiority requirements of Rule 23(b)(3), MCA. The determination as to whether a person has been made whole involves individualized assessment and issues of proof by each putative class member, which may also require medical expert testimony. *Ness*, 279 Mont. at 481, 929 P.2d at 211 (1996). Individualized issues of proof will predominate over any common issues. *Miles*, 471 F.3d at 44-45; *Newell*, 13 Cal. Rptr. 3d at 348; *Patterson*, 241 F.3d at 419; *Brooks*, 133 F.R.D. at 58; McCarthy, at 1413; *Polich*, 116 F.R.D. 261-62. ***No common set of facts exists among various putative class members; in fact the opposite is true.*** Each class member may have personal remedies based on the handling of their claim. Individual class members who have not been made whole may be better off bringing personal actions, which are not negatively influenced by those who have been made whole. Those successful in proving their claims may also be entitled to reimbursement for their attorney fees. See, e.g., *Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶36, 315 Mont. 231, 69 P.3d 652.

Order, p. 16 (emphasis added). Nothing in Appellants' Opening Brief indicates how such a ruling was an abuse of discretion.

C. Appellants cannot satisfy the typicality requirement.

Rule 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. The named plaintiff's claim will be typical "where there is a nexus between the injury suffered by the plaintiff and the injury suffered by the class." *McDonald v. Washington*, 261 Mont. 392, 402, 862 P.2d 1150, 1156 (1993) (citing *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1320 (C.A. Cal. 1982)).

The typicality requirement is designed to "screen out class actions involving legal or factual positions of the representative class which are 'markedly different' from those of other class members." *Liberty Lincoln Mercury v. Ford Marketing Corp.*, 149 F.R.D. 65, 77 (D. N.J. 1993). "If proof of the representative's claims would not necessarily prove all the proposed members' claims, the representative's claims are not typical of the proposed members' claims." *Brooks v. S. Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990); *Polich*, 116 F.R.D. at 262. "Common requests for relief ... or common legal theories do not establish typicality when the facts required to prove the claims are markedly different among class members." *Retired Chicago Police Assn. v. Chicago*, 141 F.R.D. 477, 486 (N.D. Ill. 1992).

"Generally in the application of the typicality requirement of Rule 23(a)(3), the plaintiffs are not entitled to bring a class action against defendants with whom they have had no dealings." *Murer,* 257 Mont. at 438. Individual class representatives "can only represent a class of which they are a member, i.e. claimants who have claims against the same insurer as the representative." *Id*. There is no authority "which would permit an unknown number of class members, yet to be identified to blindly sue an unknown number of defendants." *Id*.

The District Court properly ruled Appellants did not meet their burden to prove typicality with respect to claims against New West. Appellants' Complaint contains three counts against New West and two other counts which pertain only to

individual claims against BCBS, State of Montana and Montana Comprehensive Health Association. The Complaint suggests Ms. Bernhardt is a class representative for claims against New West. *See* Complaint, pp. 9-14. Appellants simply cannot establish Ms. Bernhardt's individual claim is typical of a potential class against New West, let alone other Appellees with whom she has no relevant relationship. Appellants' allegations with respect to Ms. Bernhardt reveal very individualized factual circumstances and claims, including whether New West actually denied claims and the grounds for such denials. *Id*., pp. 7-8. As the District Court stated, the lack of commonality and typicality highlights the potentially negative effect of class certification on those members who have legitimate personal actions by including a wide and divergent array of claimants who have no basis for a claim against one or more Appellees. *See* Order, p. 16.

Appellants have also erroneously argued the exclusions contained in BCBS's policies extend to all Appellees and the holding of *Blue Cross & Blue Shield of Mont., Inc. v. Montana State Auditor*, 2009 MT 318, 352 Mont. 423, 218 P.3d 475, extends to this case. The District Court properly rejected these arguments describing the differences between the State of Montana employee benefits plan at issue in this case and the fully-insured plan which was subject to the *State Auditor* decision. *See* Order, pp. 11-12. Also, as the District Court stated: "In the case *sub judice*, unlike BCBSMT's fully-insured or for-profit plans,

the Montana State Auditor/Insurance Commissioner has approved the State and MCHA's exclusion at issue here." *Id*., p. 12.

In *Brooks v. Southern Bell Telephone & Telegraph Co.,* the Florida Federal District Court cited the *Polich* decision, *supra*, in holding that factual variances in each class member's claim made it impossible for the plaintiffs to have claims typical of the proposed class. 133 F.R.D. 54, 58 (S.D. Fla. 1990). In that case, each plaintiff would be required to show a separate contract existed between the individual plaintiff and defendant. Similarly, just as there is no commonality, Appellants claims of fraud, deceit, bad faith and damages destroys typicality. *See Liberty Lincoln Mercury, Inc.*, 149 F.R.D. at 75; s*ee also McCarthy v. Kleindienst*, 741 F.2d at 1413-1414. Additionally, the class members would not necessarily benefit from any success enjoyed by the named class representatives. Thus, typicality is not satisfied in this case and the District Court appropriately denied class certification.

VI. Appellants failed to meet their burden under Rule 23(b).

Once the Court determines a class is properly defined and the elements of Rule 23(a) are satisfied, the Court must then determine the provisions of Rule 23(b) are satisfied. Mont. R. Civ. P. 23; *Amchem v. Windsor*, 521 U.S. 591 (1997); *McDonald v. Washington*, 261 Mont. 392, 862 P.2d 1150 (1993). Assuming, *arguendo*, the District Court abused its discretion in finding Appellants failed to

meet their burden in proving the requirements of Rule 23(a) were satisfied, the class still could not be certified due to Rule 23(b).

A. The primary purpose of Appellants' action is monetary relief thereby precluding certification under Rule 23(b)(2).

Appellants' claims are primarily for monetary relief and the requests for injunctive relief are merely incidental to the monetary relief sought, making certification under Rule 23(b)(2) improper. Rule 23(b)(2) is designed for cases involving primarily injunctive relief. Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." *Murer*, 849 P.2d at 1037. For example, civil rights cases where a party is charged with class-based discrimination, would be covered by Rule 23(b)(2). Appellants' allegations sound substantially in fraud, deceit and bad faith claims, which require a fact specific showing of intent on the part of each individual Appellee in relation to each Appellant and putative class member. This is impossible to show for an entire class.

Appellants could not establish any generally applicable conduct on the part of Appellees. While Appellants seek to veil their claims under the guise of injunctive relief for "programmatic" conduct, the facts simply do not support this conclusion. As discussed above, *Ferguson* is completely distinguishable from this case as there is no subrogation involved here, nor is there any indication all

Appellants and putative class members were even damaged, if at all, by the same conduct on the part of the State of Montana, BCBS and New West. As the comparison of Ms. Bernhardt and Ms. Diaz's situations highlight, even the named Appellants cannot make a colorable argument they were harmed by the same mechanisms. *See* Sections IV. and V.A., *supra*.

If the analysis under Rule 23(b)(2) continues, Appellants' argument becomes even thinner. A court can certify a class seeking money damages, as the Plaintiffs have here, if "the claim for monetary damages [is] secondary to the primary claim for injunctive or declaratory relief." *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003). To determine which type of relief is predominant, courts focus on "the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit." *Id*. at 950; *see also Robinson v. Metro-North Commuter R.R. Co*., 267 F.3d 147 (2nd Cir. 2001).

Appellants' Complaint seeks a combination of monetary, declaratory and injunctive relief. The principal basis for Appellants' claims is clearly monetary relief. Appellants first seek monetary relief for "immediate" payment of the "amounts wrongfully withheld" by the Appellees in this case, namely the medical bills incurred by Appellants. Complaint, pp. 14-15. Such relief is the basis for each of Appellants' claims relating to unjust enrichment and alleged statutory violations of the Montana Insurance Code. The declaratory relief sought by

Appellants is simply a secondary means of attaining the same monetary damages as Appellants requested the District Court issue an "order that the defendants pay the medical bills incurred by the named plaintiffs as required by the made whole doctrine." *Id*. Similarly, the injunctive relief seeks an order "requiring the defendants to determine the amount of insurance benefits they have wrongfully withheld from each member of the class." *Id*. The sole non-monetary relief sought by Appellants is a "permanent injunction requiring the defendants to cease their unlawful acts and practices." *Id*.

Strikingly consistent with Appellants' primary goal of attaining monetary damages is the new allegations contained in Appellants' proposed Amended Complaint. In their proposed Amended Complaint, Appellants sought to add claims for fraud, deceit, acting in concert, breach of contract and violations of Mont. Code Ann. § 33-18-201 as well as punitive damages and interest. *See* Appendix 9, Plaintiffs' Supplemental Memorandum in Support of Motion to Amend Complaint, p. 3. Clearly these claims and prayers for relief highlight the principal goal of Appellants' Complaint – to achieve the maximum monetary relief possible – with any injunctive relief purely secondary. Therefore, certification under Rule 23(b)(2) is inappropriate.

Despite relying on *Burton v. Mountain West Farm Bureau Mut. Ins. Co.*, 214 F.R.D. 598, 610 (D. Mont. 2003), in their opening brief, Appellants admit

Burton "is somewhat at odds with *Ferguson* regarding Rule 23(b)(2) certification." Appellants' Opening Brief, p. 27. This admission is not only correct, but is highly relevant in reaching the inevitable conclusion that Rule 23(b)(2) simply does not apply in this case. The Court in *Burton* readily disposed of the Plaintiffs' argument for certification under Rule 23(b)(2) for precisely the reasons the District Court properly found that subpart was not met in this case, stating:

> A class certified under Rule 23(b)(2) may seek "incidental" money damages. *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir.1986). ***Incidental damages appropriate under Rule 23(b)(2) certification should arise from wrongs to the class as a whole, not from circumstances that require fact finding on individual class members' cases.*** *Jefferson v. Ingersoll International, Inc.*, 195 F.3d 894, 896 (7th Cir.1999); *Lemon v. International Union of Operating Engineers*, 216 F.3d 577, 581 (7th Cir.2000); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir.1998). Here, despite Burton's claim that monetary damages are merely incidental, it is apparent that money damages are more important than equitable relief. ***Though couched in terms of seeking equitable relief, "an injunctive remedy in the form of an order compelling payment of benefits" is nothing more than a request for money damages for breach of contract.*** Additionally, any declaratory ruling would necessarily require fact finding for each individual class member and for punitive damage claims. *See Jefferson*; *Lemon*; *Allison*, *supra*.

Burton v. Mountain West Farm Bureau Mut. Ins. Co., 214 F.R.D. 598, 610 (D. Mont. 2003) (emphasis added). The *Burton* holding and reasoning is precisely why Appellants cannot certify the class under Rule 23(b)(2).

B. The predominance requirement of Rule 23(b)(3) cannot be met.

As the District Court ruled, common issues of fact or law do not predominate and a class action is not superior given the significant flaws in the class definition and the divergent factual and legal issues of the Appellants and putative class members.

The Fifth Circuit Court of Appeals has aptly described the process of determining predominance:

> This entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class. Although this inquiry does not resolve the case on its merits, it requires that the court look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law.

O'Sullivan v. Countrywide Home Loans, Inc., 319 F.3d 732, 738 (5th Cir. 2003). This rigorous review process and analysis is required to prevent the case from "degenerating into a series of mini-trials." *See Nelson v. United States Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983).

"[I]n order to make the findings required to certify a class action under Rule 23(b)(3), one must initially identify the substantive legal issues which will control the outcome of the litigation." *Walton v. Franklin Collection Agency, Inc.*, 190 F.R.D. 404, 411 (N.D. Miss. 2000) (quoting *State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 316 (5th Cir. 1978)).

Rule 23(b)(3) requires that "common questions must predominate over any questions affecting only individual members." This analysis "presumes the existence of common issues of fact or law" have been established under Rule 23(a)(2), "thus, the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3)." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). The predominance and superiority requirements of Rule 23(b)(3) are "far more demanding" than the inquiry of Rule 23(a)(2). *Amchen Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The predominance requirement is not met merely by "class members' shared experience" and "their common interest in receiving prompt and fair compensation." *Id*. at 594.

Appellants offered the District Court no argument and therefore failed to meet their burden of showing how Rule 23(b)(3) would apply in this case. In their Memorandum in Support of Class Certification, Appellants simply recited the language of Rule 23 and stated they "believe" certification is appropriate under Rule 23(b)(3) as did the plaintiff in the *Ferguson* case, but failed to show how it applies to the facts of the case. *See* Appendix 1, pp. 20-21; *see also DeBremaecker*, 433 F.2d at 734. Appellants' Opening Brief offers no substantive support, even if the argument were not waived.

As discussed with the elements of commonality and typicality, the nature of Appellants' claims of fraud, deceit, bad faith, damages and alleged entitlement to

punitive damages require individualized assessment and, in turn, separate mini-trials for each Appellant and putative class member. Appellants failed to offer any explanation how the District Court could have certified a class to resolve these particular causes of action, as well as determine damages, which require each potential class member's individualized proof. Appellants simply allege a uniform course of conduct and practice preventing Appellants from being made whole. However, as the District Court aptly concluded, it is necessary to consider whether the causes of action alleged require particularized facts involved in each potential class member's claims, thereby precluding class certification. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1412-1413 (D.C. Cir. 1984); *Newell,* 118 Cal.App.4th at 1102-1103 (denying class certification on bad faith claims because individualized proof required); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001) ("claims for money damages in which individual reliance is an element are poor candidates for class treatment, at best. We have made that plain.").

The District Court properly concluded individualized proof is required on numerous levels in this case, including:

(1) whether each individual is made whole, including the probability of needing expert medical testimony (*see* Order, p. 7);

(2) any claim under the Unfair Trade Practices Act (*see* Order, p. 9);

(3) any claim for punitive damages (*see* Order, p. 9); and

(4) the amount of money benefit entitlement and other damages for each Appellant and putative class member (*see* Order, p. 17).

Concerning the made whole analysis, the Court correctly stated:

> While a determination will need to be made in each case as to whether Montana common law relating to subrogation has been violated, that determination will require separate mini-trials for each Plaintiff which will include potential determinations as to whether: policy limits were paid by the automobile liability insurer; whether future medical treatment may be required which may necessitate expert testimony from medical practitioners; whether a Plaintiff had other automobile coverage such as medical payments and underinsured coverage; whether the third-party tortfeasor had assets available to contribute to the settlement; and the amount of medical benefits which were withheld by the State plan or MCHA and how much of that amount will be necessary to make the insured whole. While Plaintiffs' counsel attempts to argue that individualized assessment is not necessary, the Court disagrees. Therefore, as will be discussed, Plaintiffs cannot meet the various requirements of Rule 23(b) of the Montana Rules of Civil Procedure.

Order, p. 13.

Appellants also allege Appellees: (1) misrepresented facts or insurance provisions related to coverage; (2) refused to pay claims without conducting a reasonable investigation; (3) failed to affirm or deny coverage of claims within a reasonable time; and (4) neglected to attempt in good faith to effectuate prompt, fair and equitable settlement of claims where liability was reasonably clear. *See* Appendix 3, Proposed Amended Complaint, pp. 7, 11, 21. Unlike in *Ferguson*, there is simply no uniformity here. The result is an endless series of mini-trials on the issues of liability and damages for each of the undetermined number of putative

class members. A class action here would result in nothing short of a tremendous judicial burden. *See*, *e.g.*, *Patterson*, 241 F.3d 417, 419. Therefore, Rule 23(b)(3) fails to provide a basis for of class certification.

According to Appellants' Opening Brief: "The 'most significant aspect' is whether the Respondents' reduction in benefits without considering a "made whole" analysis violates Montana law 'and this question is common to all.'" Appellants' Opening Brief, p. 26. Regardless of how many times Appellants summarily conclude there is commonality and predominance and some analogy can be drawn to *Ferguson*, the record simply does not support this position. The "most significant aspect" in terms of predominance is even the named Appellants do not have a question common to all. As discussed above, it is unclear how Ms. Bernhardt has any argument she was wronged by New West when (1) all claims submitted to New West were paid; and (2) no plan exclusion was invoked. Without even reaching the merits of these issues, they present wholly different legal considerations from Ms. Diaz who alleges a plan exclusion was invoked and her claims were not paid by BCBS. Not only is the result a failure to satisfy the predominance requirement, but it highlights the need for separate mini-trials for each Appellant and putative class member to determine exactly how the Appellees (and specifically which ones) acted in accordance or in contravention of the law.

The District Court did not abuse its discretion in recognizing no factual or legal issues predominate among the Appellants and putative class, and the series of inevitable mini-trials would not make class action superior to any other method of adjudication.

CONCLUSION

For the foregoing reasons, New West respectfully requests this Court find the District Court did not abuse its discretion in denying Appellants' Motion to Certify the Class and affirm the District Court's ruling denying class certification.

Dated this 11th day of June, 2010.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that Appellee New West Health Services' Answer Brief, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 9,847words.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of June, 2010, I mailed a true and correct copy of the above and fore going Appellee New West Health Services' Answer Brief, by the United States Postal Services, postage prepaid, addressed to the following counsel of record:

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